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No. 592

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SHENANDOAH VALLEY BROADCASTING, INC., ET AL.,

Appellants,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR TO AFFIRM

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INDEX

PAGE

Under the Expediting Act an Appeal from a Determination by the District Court Under the ASCAP Antitrust Consent Decree Can Only Be Taken to This Court 2

ASCAP's Motion to Affirm Should Be Denied 6

The Proceeding below presented triable issues of fact and should not have been adjudicated by the District Court without granting appellants a hearing for the taking of evidence 6

Appellants do not ask this Court to depart from the provisions of the 1950 decree 9

There is no basis in the record for the District Court's findings of fact 10

Conclusion 13

Appendix 1a

Citations

Cases:

Andrae v. *Redfield*, 12 Blatchf. 406, 1 Fed. Cas. No. 367 (C. C. N. D. N. Y.) 11

Arkadelphia Milling Co. v. *St. Louis Southwestern Railway Co.*, 249 U. S. 134 5

Brown v. *Quindaro*, 138 F. 2d 228 (7th Cir.) 11

Hughes v. *United States*, 342 U. S. 353 9

Hunter v. *Atchison T. & S. F. Ry. Co.*, 188 F. 2d 294 (7th Cir.) 11

PAGE

Mesabi Iron Co. v. Reserve Mining Co., 270 F. 2d 567 (8th Cir.) 11

Missouri-Kansas Pipe Line Co. v. United States, 312 U. S. 502 ..... 2, 4

Sam Fox Publishing Co. v. United States, 366 U. S. 683 5

St. Louis, Iron Mountain & Southern Railway Co. v. J. F. Hasty & Sons, 255 U. S. 252 5

Terminal Railroad Assoc. v. United States, 266 U. S. 17 5

Timken Roller Bearing Co. v. United States, 341 U. S. 593 6

United States v. Atlantic Refining Co., 360 U. S. 19 ..... 8, 9

United States v. California Cooperative Canneries, 279 U. S. 553 ..... 5, 6

United States v. Yellow Cab Co., 338 U. S. 338 6

Statutes:

Federal Rules of Civil Procedure,

Rule 24(a) 3

Rule 52(a) 6

Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. §§ 28, 29

Section 1 5

Section 2 ..... 2, 4, 5, 6

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL OR TO AFFIRM

Appellants submit this brief in opposition to the motion made by appellee ("ASCAP") to dismiss the within appeal for lack of jurisdiction or, in the alternative, to affirm the judgment of the District Court without further argument.

POINT I

Under the Expediting Act an appeal from a determination by the District Court under the ASCAP antitrust consent decree can only be taken to this Court.

Section 2 of the Expediting Act requires that an appeal be taken directly to the Supreme Court (i) "in every court action brought in any district court of the United States under [the antitrust laws]", (ii) "wherein the United States is complainant" and (iii) where the appeal is "from the final judgment of the district court."

All of these conditions are met here. The Amended Final Judgment herein was entered on March 14, 1950 as a final decree in an action brought by the United States against ASCAP under the Sherman Act. Section IX(A) of the decree provides that ASCAP shall upon the receipt of an application for a music license advise the applicant of the fee which it deems reasonable for the license requested, and that in the event the parties cannot agree "the applicant therefore may forthwith apply to this Court for the determination of a reasonable fee" (Appendix, p. 17a). By making an application to the District Court under Section IX of the decree appellants became parties to that decree to the extent and for limited purpose of enforcing specific obligations imposed on ASCAP by its provisions, and any appeal from a final judgment in such a proceeding must be taken to this Court.

This precise point was ruled upon by this Court in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502. In that case the Government brought an antitrust action against certain companies and individuals, charging them with conspiring to suppress a competitor, the Pan-

handle Eastern Pipe Line Company ("Panhandle Eastern"). Panhandle Eastern was not joined as a defendant. The action terminated in a consent decree. Sections IV and V of the decree placed certain obligations on the defendants to prevent them from restricting the competitive activities of Panhandle Eastern, and permitted Panhandle Eastern to apply to a district court to enforce these prohibitions.

Subsequently, when the consent decree was reopened and the defendants sought certain modifications, the Missouri-Kansas Pipe Line Company ("Missouri-Kansas"), a large shareholder in Panhandle Eastern, sought to intervene to protect Panhandle Eastern's interests. The District Court denied intervention.

On appeal, this Court reversed. Brushing aside the defendants' contentions that Rule 24(a) of the Federal Rules of Civil Procedure gave Missouri-Kansas no right to intervene, this Court (per Justice Frankfurter) pointed out that:

> "All of these arguments misconceive the basis of the right now asserted. The foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis . . .
>
> "To enforce the rights conferred by Section IV was the purpose of the petition. Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem. And since the protection afforded Panhandle by Section IV of

> the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable." (312 U. S. at pp. 506, 508)*

The situation here presents a stronger case than *Missouri-Kansas*. In *Missouri-Kansas* the moving party was not Panhandle Eastern, but its shareholder Missouri-Kansas, which asserted Panhandle Eastern's rights derivatively. Here it is undisputed that applicants themselves are "music users" and within the class specified by Section IX of the ASCAP consent decree. Furthermore, Section IX of the ASCAP decree not only grants appellants the right to apply to the District Court for a determination of reasonable fees for the license requested by appellants but further provides that by making such an application appellants subject themselves to the rate-making power of that court. Under Section IX(b), the District Court is empowered to fix an interim fee, and if it does so "the applicant shall accept a license providing for the payment of a fee at such interim rate" (Appendix, p. 17a). Here the District Court did in fact enter a preliminary order fixing an interim fee and ordering the applicants to make such fee payments to ASCAP (R. 548-549).

Section 2 of the Expediting Act is not limited to appeals from a "final judgment" on the issues raised in the underlying complaint, or to ancillary proceedings under an anti-

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* A prior appeal to the Court of Appeals by Missouri-Kansas had been dismissed for lack of jurisdiction for the reason that under the Expediting Act appellate jurisdiction was vested exclusively in the Supreme Court. 108 F. 2d 614 (3rd Cir.), certiorari denied, 309 U. S. 687.

trust decree in which the United States is the "complainant." Thus in *Terminal Railroad Assoc. v. United States*, 266 U. S. 17, where one group of defendants brought contempt proceedings against another group of defendants for alleged violations of an antitrust decree, this Court held that Section 2 of the Expediting Act controlled, and that the only appeal from the contempt order lay with the Supreme Court. In *United States v. California Cooperative Canneries*, 279 U. S. 553, where a company not a party to a consent decree sought to intervene and stay that decree, this Court held that an appeal by the intervenor, like an appeal by one of the original parties, must be taken directly to the Supreme Court (279 U. S. at 559).

These decisions confirm the general rule that where a specified federal trial or appellate court is invested with jurisdiction in a certain cause, whether by constitutional or statutory authority, then that court normally also has jurisdiction over ancillary or supplemental proceedings pendent thereto. *United States v. California Cooperative Canneries*, 279 U. S. 553 at p. 559; *St. Louis, Iron Mountain & Southern Railway Co. v. J. F. Hasty & Sons*, 255 U. S. 252 at p. 254; *Arkadelphia Milling Co. v. St. Louis Southwestern Railway Co.*, 249 U. S. 134 at pp. 140-142.

No basis exists for ASCAP's contention that appeals under Section 2 of the Expediting Act are limited to cases of "great public interest." Section 2 of the Act does not require a finding of "great public interest" for appellate jurisdiction to be properly in this Court. *See, e.g., Sun Fox Publishing Co. v. United States*, 366 U. S. 683. By contrast, Section 1 of the Expediting Act, 32 Stat. 823 (1903) as amended; 15 U. S. C. 28, which governs the expedition of antitrust actions in the trial courts, does re-

quire that before its provisions are applicable the Attorney General file a certificate that the case is of "general public importance." No such requirement is contained in Section 2 of the Act governing appeals to this Court. In any event, for the reasons stated in our Jurisdictional Statement, the questions presented here are of substantial public importance.

ASCAP's contention that this Court should reject appeals in proceedings of this nature in order to avoid an exhaustive review of factual determinations ignores the fact that review of a final determination in a rate-fixing proceeding is subject to the limitations prescribed by Rule 52(a) of the Federal Rules of Civil Procedure. Compare *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 at pp. 596-97; *United States v. Yellow Cab Co.*, 338 U. S. 338, 340-42.

POINT II

ASCAP's motion to affirm should be denied.

The proceeding below presented triable issues of fact and should not have been adjudicated by the District Court without granting appellants a hearing for the taking of evidence

ASCAP's attempted justification of the District Court's decision furnishes a telling demonstration that the District Court erred in refusing to hold a hearing for the taking of evidence. All of the arguments advanced by ASCAP either rest on the proof of facts asserted in ASCAP's offer of proof or are based on assumptions which are demolished by the facts that appellants offered to prove.

ASCAP contends that the licenses sought by appellants are inconsistent with the terms of the 1950 decree in that

they would destroy the "option" that independent film producers have to "clear music at the source" under Sections V(B) and (C) of the 1950 decree (Appellee's Brief, pp. 5 and 14).

This contention, which repeats almost word-for-word portions of ASCAP's offer of proof (R. 1027), could not be seriously maintained before this Court if the District Court had considered the evidence offered by appellants. Appellants' proof shows that existing agreements between ASCAP's members and film producers, by requiring film producers to assign all music performance rights to ASCAP for licensing to broadcasters, effectively destroy any "option" on the part of the film producers to clear music at the source (Appendix, pp. 61a-63a). Moreover, Section V(A) of the 1950 decree offers the same "option" to "clear music at the source" to television networks that Section V(B) and (C) offers to film producers. Yet, as appellants are prepared to prove, all of ASCAP's existing local television licenses exclude network programs, leaving television networks no real choice but to clear network programs at the source (Appendix, p. 67a). Thus according to the argument now advanced by ASCAP, the existing local station licenses have the same alleged infirmity as appellants' proposed license.

ASCAP contends that under the 1950 decree it is not obligated to issue "blanket" licenses, but only "per program" licenses (Appellee's Brief, p. 17). Yet in the past, and before the District Court, ASCAP recognized its legal obligation under the decree to offer both "per program" and "blanket" licenses to broadcasters (Appendix, pp. 66a-72a). That evidence should have been considered by

the District Court. Compare *United States* v. *Atlantic Refining Co.*, 360 U. S. 19 at pp. 22-23.

Nothing in the record supports the District Court's finding that the licenses sought by appellants are not the type of "blanket" or "per program" licenses specified in the decree (Appendix, p. 1a). Nevertheless, ASCAP tries to defend this ruling by asserting that Section VII(A) of the decree refers only to licenses "for which the fee is based on revenues from *all* programs" (Appellee's Brief, p. 18), and that Section VII (B) refers only to licenses for which the fee is based on a station's revenues or card rates for each program containing ASCAP music "*whether or not the program consists of pre-recorded material*" (Id., p. 14).

These sections of the decree do not contain any such conditions. Nothing in Section VII requires a "blanket" or "per program" license to cover all of a broadcaster's programs. This Section is not concerned with the scope or number of programs covered by a license. It is limited to prescribing alternative methods of determining the fee due ASCAP for any group of programs that may become the subject of a license. Section VI(A) refers to a license the fee for which "is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory", as distinguished from the "per program" fee basis prescribed by Section VII(B) (Appendix, p. 15a). There is no requirement in Section VII(B) that "per program" licenses cover programs consisting of pre-recorded material as well as locally originated material (Appendix, pp. 15a-16a).

The only interpretation of Sections VII(A) and (B) consistent with ASCAP's existing licenses is the one ad-

vanced by appellants, i.e., that the fee for a "blanket" license is based on revenues derived from all programs covered by the license, including programs not using ASCAP music, whereas the fee for a "per program" license is limited to revenues derived from programs covered by the license which actually use ASCAP music. If, as ASCAP now contends, Sections VIII(A) and (B) contemplated only licenses covering all of a broadcaster's programs, then ASCAP's existing local station "blanket" and "per program" licenses would not be "blanket" and "per program" licenses within the meaning of the decree since they specifically exclude network and certain other types of programs from their coverage (Appendix, p. 67a).

Appellants do not ask this Court to depart from the provisions of the 1950 decree

Appellants' position in this case is in no way inconsistent with this Court's rulings in *Hughes* v. *United States*, 342 U. S. 353, and *United States* v. *Atlantic Refining Co.*, 360 U. S. 19. In these cases this Court refused to adopt interpretations of consent decrees which were contrary to the specific terms of the decrees themselves. Here the posture of the parties is exactly the converse. On its face the ASCAP decree is clear: Section IX requires ASCAP to quote a fee "for the license requested" by a music user. It is ASCAP that seeks to escape the plain import of this language by adverting to the difficulties that might arise from a literal reading of this language (Appellee's Brief, p. 13). Appellants rely on the historical background of the decree not as a basis for departure from its terms but in order to demonstrate that Section IX means precisely what it says, and should not be construed to impose a lesser obligation on ASCAP.

The interpretation of the decree advanced by appellants would not, as ASCAP claims, force ASCAP to issue thousands of different types of licenses each differing in its terms (Appellee's Brief, p. 13). Appellants do not assert that they are entitled to dictate the terms of their license. What appellants claim they are entitled to do is to specify the class of programs for which they want a license. The precise terms of the license are properly left to negotiation with ASCAP, subject to the rate-fixing power of the Court under Section IX of the decree.

There is no basis in the record for the District Court's findings of fact

ASCAP cites an affidavit submitted by ASCAP's counsel in connection with a motion for preliminary injunctive relief (Appellee's Brief, pp. A-1-A-31) in an effort to justify the District Court's actions in (1) making factual findings after rejecting both parties' offers of proof and (2) refusing to hold a hearing for the taking of evidence (Appendix, p. 33a). This attempted justification is without merit.

In its opinion of September 14, 1962 dismissing appellants' petition, the District Court purported to find that the license sought by appellants

> "is a radically different license from that under which petitioners have been operating under the decree for the past twelve years." (Appendix, p. 1a)

that

> "The type of license sought is neither the blanket nor per program license described in the judgment." (Appendix, p. 1a)

and that

> "Local and network blanket television licensing agreements were made in 1949, 1954 and 1958; sub-

stantially the same provisions were contained in each agreement." (Appendix, p. 58a)

None of these findings could have been based on the affidavit cited by ASCAP. That affidavit was submitted in connection with a motion for preliminary injunctive relief, and for the purpose of showing that the need for such relief had been "rendered moot" by reason of ASCAP's receipt of certain necessary authorizations from its members (Appellee's Brief, p. A-2). The affidavit makes no claim that the existing licenses were negotiated prior to entry of the 1950 decree. On the contrary, the affidavit notes that in 1949 television broadcasters rejected the type of license then offered by ASCAP (Appellee's Brief, p. A-6). While the affidavit states that the television networks (as distinct from television broadcasters) agreed upon a certain "form of license" in 1949, the terms of this license are neither set out nor discussed.

It would in any event have been error for the District Court to base findings made in connection with a final judgment on statements appearing in an affidavit submitted in opposition to a motion for preliminary injunctive relief. *Addrac v. Redfield*, 12 Blatchf. 467, 1 Fed. Cas. No. 376 (C. C. N. D. N. Y.), *affirmed*, 98 U. S. 225; *Mesabi Iron Co. v. Reserve Mining Co.*, 270 F. 2d 567 (8th Cir.); *Hunter v. Atchison T. & S. F. Ry. Co.*, 188 F. 2d 294 (7th Cir.), at pp. 298-299, *certiorari denied*, 342 U. S. 819; *Brown v. Quinlan*, 138 F. 2d 228 (7th Cir.). As the Court of Appeals for the Seventh Circuit pointed out in *Brown v. Quinlan*, *supra*:

> "In entering its order disposing of the application for temporary injunction, the District Court proceeded to dismiss the complaint without any hearing upon the merits. We assume that the court

indulged the presumption that the evidence would be the same upon final hearing. Such an assumption was unjustified, for the parties had not stipulated that fact; nor had defendant waived its right to present additional evidence upon final hearing on the merits. Consequently that court could not properly thus finally dispose of the litigated issues." (138 F. 2d at p. 229)

This rule is especially applicable here since the affidavit in question was submitted after the Court advised the parties that it would grant appellants' motion to the extent of maintaining the status quo, and ASCAP's counsel consented to the entry of such an order (R. 176, 223, 238). Under the circumstances, there was no reason for appellants to controvert matters in the affidavit collateral to the issues then before the Court. This was recognized by the District Court which, in granting preliminary relief, pointed out that

> "What the terms of that renewal license should be is a matter which must await judicial decision *rendered only after a full hearing*, and this does not lie with the interim injunctive relief sought." (R. 546)

ASCAP also suggests, without elaboration (and without having designated any portion of the pertinent proceeding for inclusion in this record on appeal), that the District Court could have made its factual findings on the basis of judicial notice of the *Voice of Alabama* case, a rate proceeding initiated by television [illegible] 1951 (Appellees' Brief, p. 4, n. 2). Far [illegible] the District Court's findings, the record in the *Alabama* proceeding (a copy of the petition is set out in an appendix

annexed to this brief) shows that television broadcasters were not able to reach agreement with ASCAP prior to the entry of the 1950 consent decree and brought the *Town of Alabama* proceedings for the very purpose of obtaining a judicial resolution of ASCAP's obligations under the 1950 decree.

CONCLUSION

Appellee's motion to dismiss the appeal or to affirm should be denied.

Respectfully submitted.

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APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 13-95

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ET AL.,

Defendants.

In the Matter of the Application of VOICE OF ALABAMA, INC. et al.,

Petitioners,

For the Determination of Reasonable License Fees.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of VOICE OF ALABAMA, INC., et al., respectfully alleges:

1. The corporations (hereinafter referred to as the "petitioners") enumerated in Schedule A annexed to this

Omitted from this Appendix

petition are each corporations duly organized and existing under the laws of the respective states listed in Schedule A opposite the name of each corporation. Each petitioner operates a television broadcasting station or stations known by the respective call letters and situated in the respective city and state listed in Schedule A opposite the name of each petitioner, all pursuant to licenses from the Federal Communications Commission.

2. On March 14, 1950 this Court entered its Amended Final Judgment in the action entitled "United States of America, Plaintiff, v. American Society of Composers, Authors and Publishers, et al., Defendants", Civil Action No. 13-95 (hereinafter referred to as the "ASCAP Final Judgment"). This petition is filed for relief at the foot of the ASCAP Final Judgment.

3. Paragraph IX (A) of the ASCAP Final Judgment provides as follows:

> "Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such pro-

ceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Sub-section (B) hereof, and to the final order or judgment entered by this Court in such proceeding;"

4. Pursuant to Paragraph IX (A) of the ASCAP Final Judgment the petitioners made written applications to defendant American Society of Composers, Authors and Publishers (hereinafter referred to as defendant "ASCAP") for licenses for the right of public performance by their respective stations of the compositions in the ASCAP repertory. In addition, petitioner Allan B. DuMont Laboratories Inc. made an application for network licenses for the right of public performance of the compositions in the ASCAP repertory.

5. The parties have been unable to agree upon a reasonable fee for the licenses applied for. More than sixty days have elapsed from the date when such applications were received by ASCAP. The sixty day period of negotiations provided for in Paragraph IX (A) of the ASCAP Final Judgment has by agreement of the parties been extended from time to time; the last such extension expires on July 18, 1951.

Appendix

6. Paragraph IX (B) of the ASCAP Final Judgment provides as follows:

> "When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;"

7. Heretofore petitioners, except Birmingham Broadcasting Company, Inc. and Allan B. DuMont Laboratories Inc., entered into interim license agreements whereby ASCAP granted to said petitioners the right of public performance of the compositions in the ASCAP repertory for an interim period. Pursuant to such interim license agreements said petitioners have been paying and have tendered interim license fees to ASCAP for such grants.

WHEREFORE petitioners respectfully apply to this Court at the foot of the ASCAP Final Judgment (a) for a determination of a reasonable fee for the proposed licenses and (b) for the fixing of an interim fee for such licenses pending final determination of what constitutes a reasonable fee and (c) for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y.
July 18, 1951

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